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No. 289

In the

Supreme Court of the United States

OCTOBER TERM, 1966.

JOSEPH MORRIS, FRANCIS J. BAILEY; ARTHUR P. LINDSEY, LESTER M. ANGLIN, JESSE J. WORD, EDWIN E. WILLIAMS, ALVIN J. PALMER, WILLIAM D. CROWELL, DAVID MOZEE, SAMUEL MOSELY, COLUMBUS C. BROOKS, JR.,

Petitioners,

vs.

RICHARD ATTREAU,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Position of respondent

It is the position of respondent that the subject petition should be denied for the following reasons:

1. The instant case involves a proper and well recognized application of § 1983 of the federal civil rights act to a complaint which charges that under color of state law, petitioners employed their sensitive positions in the Chicago police department to arrest and detain respondent, to cause him to be suspended from the police force for over thirteen months, to falsely accuse him of crime before the Chicago Police Board and in the Criminal Court of Cook

County, in order that petitioners could exculpate themselves from criminal charges and to satisfy their personal animosities against respondent and other police officers.

2. *Every* federal authority which has considered allegations of a similar nature has held that a cause of action is stated under § 1983 of the federal civil rights act. For example, see *Culp* v. *U.S.*, 131 F. 2d 93 (C.A. 8, 1942); *Brown* v. *U.S.*, 204 F. 2d 247 (CA. 6, 1953); *Hardwick* v. *Hurley*, 289 F. 2d 529, 531 (C.A. 7, 1961); *Bargainer* v. *Michal*, 233 F. Supp. 270 (N.D. Ohio, 1964) and *Beauregard* v. *Wingard*, 230 F. Supp. 167 (S. D. Cal. 1964).

3. Petitioners cannot cite a *single* authority which in any way suggests that a cause of action has *not* been stated under the federal civil rights act.

4. Petitioners incorrectly state that the questions raised in this case are whether the federal civil rights act may be used to review the internal administrative policies of a police department and whether a false arrest of itself violates the federal civil rights act. None of these issues are involved in the instant case and the latter issue was specifically not decided by the Court of Appeals.

5. Petitioners have gone far outside of the record to inject matters which at best constitute *factual defenses* to the charges of respondent. These factual defenses demonstrate the validity of the Court of Appeal's conclusion that this case should be remanded for a trial on all of the facts.

6. The instant case raises no new or unusual questions of law nor does it conflict with any decision of this Court or any other federal court. The decision is proper in all respects.

Statement of Facts

The opinion of the Court of Appeals sets out in full the wrongful acts attributed to petitioners (petition 13-15). Peitioners in their "Statement" (petition 3-5) omit any reference whatsoever to the wrongful and ulterior motives which impelled them to commit the improper acts attributed to them. Thus, respondent alleged that petitioners arrested and detained him without cause, caused him to be suspended from duty, caused him to be falsely accused before the Police Board, and caused him to be indicted on the basis of perjured grand jury testimony, in order that petitioners could exculpate themselves from criminal charges and to satisfy their personal animosities against other officers. Petitioners were especially motivated against respondent because he had refused to wrongfully accuse the captain of the district to which he was assigned and another officer in that district, despite petitioners' request to the contrary (petition 14-15).*

The case is hardly one of an erroneous arrest and prosecution, as suggested by petitioners (petition 11).

Accordingly, respondent calls the Court's attention to the statement of facts contained in the Court of Appeals' opinion and respectfully submits that a cause of action is stated under § 1983 of the federal civil rights act.

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* Petitioners' reference to *Magee* v. *Williams*, 329 F. 2d 470 (C.A. 7, 1964) (petition 3) in describing the purpose of the Internal Investigation Unit of the Chicago Police Department is misleading. There, the plaintiff police officer conceded that the allegedly objectionable acts of officers of the Internal Investigation Division were *honestly* motivated and had been applied to all police officers. The Court of Appeals concluded that no cause of action had been stated because the acts represented a *legitimate* exercise of duties which the plaintiff conceded the defendants, as members of the Internal Investigation Division, were required to perform. Judge Schnackenberg, the author of the *Magee* opinion and the opinion in the instant case, for that reason distinguished *Magee* from the instant case (petition 16-18).

ARGUMENT

I.

PETITIONERS VIOLATED § 1983 OF THE CIVIL RIGHTS ACT BY ARRESTING AND DETAINING RESPONDENT WITHOUT CAUSE AND BY CAUSING HIM TO BE SUSPENDED FROM DUTY, TO BE FALSELY ACCUSED BEFORE THE POLICE BOARD AND TO BE INDICTED ON THE BASIS OF PERJURED GRAND JURY TESTIMONY, IN ORDER TO EXCULPATE THEMSELVES FROM CRIMINAL CHARGES AND BECAUSE OF THEIR PERSONAL ANIMOSITY FOR OTHER OFFICERS.

In an attempt to create "an issue of national importance" (petition 6) which would justify further review of this case by this Court, petitioners completely misstate the substance of the opinion of the Court of Appeals and the facts alleged in respondent's complaint, and assume the very issue of fact created by the complaint.

Thus, petitioners state (petition 6) "* * * [I]t is an entirely new and different proposition to hold that the federal civil rights acts may be invoked by members of a police department who become dissatisfied with the *lawful* orders of their departmental superiors." (emphasis added)

Respondent does not disagree with this statement as an abstract proposition of law. However, the statement has no application to the instant case. Respondent here has not challenged "the *lawful* orders" of his superiors. On the contrary, he has charged petitioners, fellow police officers, with a vicious pattern of *unlawful* conduct under color of state law committed by petitioners for the purpose of exculpating themselves from criminal charges and to satisfy their personal animosities against fellow police

officers; that to fulfill and satisfy these ulterior and personal motives and animosities, petitioners caused respondent to be wrongfully arrested and detained, to be wrongfully suspended for well over a year from his position on the police force, to be falsely accused before the Police Board, and to be indicted by the grand jury of Cook County on the basis of perjured testimony; as a consequence respondent was forced to defend himself against the false charges before the Police Board and in the Criminal Court of Cook County, at great expense and damage to himself.

Petitioners' only answer to these allegations is a *controverted factual defense* to *one* of the steps in their unlawful conduct—that "respondent was *not* arrested, but rather * * * was obeying the lawful rules and regulations of the Chicago Police Department * * * by appearing at Unit Headquarters and cooperating in a 12 hour investigation by the Internal Investigation Division" (petition 6).*

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* Petitioners' inferential attack on respondent's allegation of arrest, urged more specifically in the Court of Appeals, but not in this court, is not valid. The point was not specifically raised in respondent's motion to dismiss or supporting brief in the trial court (A. 9-22) and should not be available to them for the first time on appeal: Rule 12(h), Federal Rules of Civil Procedure; *Munson Line, Inc.* v. *Green*, 6 F.R.D. 470, 475 (S.D. N.Y. 1949); *Smeed* v. *Carpenter*, 247 F. 2d 414, 418 (C.A. 9, 1960). Secondly, the allegation that petitioners did "arrest the plaintiff * * * did detain the plaintiff for a period of twelve hours (A. 4, ¶ 7)" in itself connotes all legal acts necessary to accomplish an arrest. No physical touching or other similar acts are required. *People* v. *Mirbelle*, 276 Ill. App. 533, 540-2 (1st Dist. 1934). Black's Law Dictionary (4th ed. p. 140) defines "arrest" as "the apprehending or detaining of the person in order to be forthcoming to answer an alleged or suspected crime."

This statement directly conflicts with the allegations of respondent's complaint taken as true for purposes of petitioner's motion to dismiss, and is an improper contention to sustain a dismissal order. As the Court of Appeals stated (App. 19):

> "The short answer to defendants' contention is that a question of fact may be present as to whether *their counsel's* present characterization of the conduct of defendants, as appearing in the complaint, is to be believed, or whether plaintiff's characterization thereof is to be believed. This issue requires that defendants answer the complaint, join issues and permit the trier of facts to decide the factual issues. We cannot decide by merely considering defendants' factual contention as stated in their brief. They should be required to file an answer. *Coleman* v. *Johnson,* 7 Cir., 247 F. 2d 273, 275 (1957)." (italics the Court's)

Petitioners seek to attribute further "unique" qualities to the opinion in question by asserting that the opinion "authorizes the federal civil rights act to be invoked in cases which amount to simple false arrest or malicious prosecution under State tort law" (petition 8).

This statement is incorrect. The Court of Appeals expressly held that it was unnecessary to decide this "abstract proposition" because the unlawful pattern of the several different acts attributed to petitioners "must *all be considered together* in determining whether the complaint sufficiently charges a violation of the civil rights act" (petition 16).

Petitioners incorrectly state that the Court of Appeals "cited no case or precedent for the decision. The reason is obvious. *There is no precedent for the Court of Appeals decision.* The precedent is to the contrary." (emphasis petitioners') (petition 8).

This statement is also incorrect. The civil rights act violations contained in respondent's complaint are so manifest, no citation of authority is required to support the Court of Appeals' conclusion. However, the court did cite its own opinion in *Coleman* v. *Johnson,* 247 F. 2d 273, 275 (C.A. 7, 1957). (petition 19) There, the court held a § 1983 cause of action was stated where plaintiff charged that defendant police officers and prison officials wrongfully arrested and jailed plaintiff without bringing a charge against him and failed to provide medical attention which he obviously needed. The instant case, based on the illegal and ulterior motives attributed to petitioners, is much stronger than the *Coleman* case.

Moreover, respondent referred the court to *ten* other pertinent citations, many of which referred to several other applicable decisions. Petitioners in the Court of Appeals failed to distinguish any of these citations. All of these cases hold that official action impelled by an ulterior or otherwise improper motive violates the constitutional rights of the person affected and therefore, § 1983 of the Civil Rights Act. For example, *Beauregard* v. *Wingard,* 230 F. Supp. 167, 170 (S.D. Cal. 1964 (complaint stated that police officers arrested plaintiff, jailed him and caused him to the charged with the commission of a crime, caused him to be tried in court where he was acquitted, for the purpose of obtaining revenge against plaintiff for having criticized defendant police officers); *Hardwick* v. *Hurley,* 289 F. 2d 529, 531 (C.A. 7, 1961) (plaintiff charged that defendant police officer arrested him and beat him as punishment because of plaintiff's refusal to take a drunkometer test to measure the alcoholic content of his breath); *Culp* v. *U. S.,* 131 F. 2d 98, 98 (C.A. 8, 1942) and *Brown* v. *U. S.,* 204 F. 2d 247 (C.A. 6, 1953) (charge that police officers arrested and jailed

plaintiffs in order to extort money from them); *Bargainer* v. *Michal,* 233 F. Supp. 270, 273 (N.D. Ohio 1964) (plaintiff charged that defendant police officers attacked plaintiff and "subsequently caused false and fraudulent charges to be lodged against him with the Juvenile Court of Cuyohoga County, Ohio in order to 'cover up' the attack upon the plaintiff").

All of the above decisions held that a cause of action was stated under § 1983 because police officers used their official positions to satisfy illegal or ulterior motives unrelated to the honest and legitimate enforcement of law.

Other decisions which hold that official action founded on ulterior or otherwise improper motives constitutes a violation of § 1983 of the Civil Rights Act are *Scolnick* v. *Winston,* 219 F. Supp. 836, 839 (S.D.N.Y. 1963) (Commitment of plaintiffs to a mental institution to intimidate them so that they would be helpless in their investigation of an illegal real estate operation and to prevent the disclosure of a "fixed" tribunal); *Progress Development Corp.* v. *Mitchell,* 286 F. 2d 222 (C.A. 7, 1961) (Use of official power of condemnation in order to void construction of a housing development to be occupied on an integrated basis because integration considered obnoxious to local mores); *Corsican Productions* v. *Pitchess,* 338 F. 2d 441 (C.A. 9, 1964) (Threats of prosecution of movie exhibitors by sheriff in order to suppress plaintiff's movie which sheriff considered objectionable); *Robeson* v. *Fanelli,* 94 F. Supp. 62 (S.D.N.Y. 1950) (Refusal to prevent mob from attacking meeting because police wanted meeting to be broken up); and *Spires* v. *Bottorff,* 317 F. 2d 273 (C.A. 7, 1963) (Alleged attempt by judge to discourage warden from permitting prisoner from seeking redress in court, because prisoner had harrassed judge with letters, etc.)

The complaint in the instant case falls squarely within the principles of the above decisions. Here, respondent charges that petitioner without cause or other lawful authority and under color of state law, (1) arrested and detained him for 12 hours, (2) caused him to be suspended from duty, (3) caused an indictment based on perjured testimony to be returned against him, and (4) caused false charges to be filed against him before the police board.

None of these acts were done for purposes of legal and proper law enforcement. On the contrary, these acts were perpetrated because petitioner wanted "to exculpate themselves or fellow police officers assigned to the Internal Investigation Unit from the charges contained in the letter dated November 20, 1960 and because of personal dislike for the commanding officer and other officers assigned to the Englewood Police District * * *" and because plaintiff refused to falsely accuse other police officers (A. 4-5, ¶7).

It is respectfully submitted that any one of the 4 separate wrongful acts committed by petitioners for such ulterior motives violated respondents right to due process of law under the 14th Amendment and more than justify an action under § 1983.

The only authority cited by respondents, *Agnew* v. *City of Compton*, 239 F. 2d 226 (C.A.9, 1957) (pet. 9), to the extent that it is still valid law, supports respondent's position in this case. In *Agnew*, the court held that an illegal arrest resulting from a "law officer's *honest* misunderstanding of law" does not violate the civil rights act (239 F. 2d at 231). In the instant case, respondent unequivocally alleged that his arrest and subsequent maltreatment by petitioners resulted from a *dishonest* motive, not from any misunderstanding.

In addition, the further holding of the *Agnew* case that no civil rights act violation occurs "absent allegations that the purpose of the arrest was to discriminate between persons or classes of persons" (p. 229) is an incorrect statement of the law. This holding was specifically overruled by the same court in *Cohen* v. *Norris,* 300 F. 2d 24, 28 (C.A. 9, 1962), based on this Court's decision of *Monroe* v. *Pape,* 365 U.S. 167 (1961).*

II.

THE HOLDING OF THE COURT OF APPEALS IS NOT BASED ON THE "SINGLE ALLEGATION OF ERRONEOUS ARREST OR PROSECUTION."

Petitioners incorrectly state that the Court of Appeals' decision "would afford federal court jurisdiction for the trial of *every* common law action for false arrest or malicious prosecution" or where there is "a single allegation of *erroneous* arrest or prosecution" (petition 11) (emphasis added).

None of these elements is the basis of respondent's complaint. Respondent does *not* allege an "erroneous" arrest or prosecution. Respondent does *not* allege a simple false arrest or malicious prosecution by petitioners. Respondent alleges an *intentional,* comprehensive scheme against respondent whereby petitioners utilized their official police positions to exculpate themselves from

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* The invalidity of this aspect of the *Agnew* case has been repeatedly recognized in other subsequent decisions. For example, see *Roberts* v. *Trapnell,* 213 F. Supp. 49, 50 (E.D. Pa. 1962); *Roberts* v. *Barbosa,* 227 F. Supp. 20, 26 (S.D. Cal. 1964); *Beauregard* v. *Wingard,* 230 F. Supp. 167, 177 (S.D. Cal. 1964) and *Bell* v. *Hosse,* 31 F.R.D. 181, 184 (M.D. Tenn. 1962).

criminal charges and to satisfy their own personal animosity against other officers, including respondent.

Respondent must prove these allegations at trial—not the simple allegations of an erroneous false arrest or prosecution which petitioners would attribute to the complaint herein. No improper invasion of the *lawful* operations of the Chicago Police Department will result.

Conclusion.

For all of the above reasons, it is respectfully submitted that the instant petition should be denied.

Respectfully submitted,

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REPLY BRIEF.

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REPLY BRIEF.

In reply to respondent's brief in opposition to the petition for writ of certiorari, petitioners state as follows:

I.

Respondent attempts to minimize the pronouncements of *Magee* v. *Williams,* 329 F. 2d 470 (7th Cir. 1964) as to the functions of the Internal Investigation Division of the Chicago Police Department and to gloss over the obvious inconsistency between *Magee* and the instant cause. Respondent states that in *Magee* "the plaintiff police officer conceded that the allegedly objectionable acts of officers

of the Internal Investigation Division were *honestly* motivated . . .'' (Respondent's Br., p. 3, f. n.) (Emphasis supplied by Respondent.) A reading of *Magee* shows the opposite to be correct. In *Magee,* the Seventh Circuit set out plaintiff's charge (as stated in his complaint) that the defendants' actions were allegedly *dishonestly* motivated, saying (p. 473):

> ''On or about August 17, 1962, plaintiff lawfully arrested Eubanks for aggravated assault involving a deadly weapon, on the complaint of a minor. Plaintiff charges on information and belief that defendant Eubanks, a police officer, persuaded his superiors to attempt an entrapment of plaintiff as aforesaid and to enter the charged conspiracy in order to discredit plaintiff and make him less effective in the matter of the charges against defendant Eubanks.''

The Seventh Circuit upheld the dismissal of the complaint in *Magee.*

The essence of the *Magee* holding is the same as the rationale underlying the basic contention of the petitioners herein: A police officer is subject to the supervision of his official activities and may not invoke the federal civil rights act to challenge such supervision. In the instant cause, Circuit Court Judge Knoch (dissenting opinion) correctly observed that ''as a policeman, surely plaintiff was subject to supervision of his official activities'' (Appendix A of Petition, p. 20).

II.

Petitioners state that the opinion ''authorizes the federal civil rights act to be invoked in cases which amount to simple false arrest or malicious prosecution under State tort law'' and that ''no case or precedent is cited'' for such authorization (Petition, p. 8). Respondent charges that this statement is incorrect and cites a host of cases

which allegedly are precedent for invoking the federal civil rights act in cases of simple false arrest or malicious prosecution (Respondent's Br., pp. 6-8). A reading of these cases shows (a) no such statements are made therein, and (b) all such cases involve aggravated conduct over and above simple false arrest or malicious misconduct.

It is an easy matter for respondent to allege: "The civil rights act violations contained in Respondent's complaint are so manifest, no citation of authority is required to support the Court of Appeals' conclusion" [sic.] (Respondent's Br., p. 7). However, the fact remains that the Seventh Circuit failed to cite any authority, not because the alleged violations were "so manifest", but, because the issue involved is one of first impression for which there is no authority to cite.

III.

Respondent makes much of the fact that the holding of *Agnew* v. *City of Compton,* 239 F. 2d 226 (9th Cir. 1957) to the effect that a complaint is defective "absent allegations that the purpose of the arrest was to discriminate between persons or classes of persons" (p. 229) has been overruled (Respondent's Br., p. 10 and f.n.). This is misleading. In citing *Agnew,* petitioners informed this Court of such and cited the very case wherein this aspect of *Agnew* was overruled (Petition, p. 9). However, that portion of the *Agnew* opinion which supports our contention that a false arrest in and of itself does not invoke civil rights act liability *has not* been overruled.

IV.

Respondent insists that the "instant case raises no new or unusual questions of law nor does it conflict with any decision of this Court or any other federal court" (Respondent's Br., p. 2). Both contentions are incorrect.

As shown in our Petition, the instant case raises the new and unusual question of whether the civil rights act may be invoked to review the internal administrative and disciplinary procedures of a local police department. Moreover, the opinion of the Court of Appeals does conflict with the rationale of previous holdings of federal courts. See, *e. g.*, the *Magee* and *Agnew* cases cited herein.

Conclusion.

For the foregoing reasons and for the reasons set forth in the petition, petitioners pray that a writ of certiorari issue to the United States Court of Appeals, Seventh Circuit.

Respectfully submitted,

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